Filed 6/30/09 In re K.M. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re K.M. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. D.M., Defendant and Appellant.	G041246 (Super. Ct. Nos. DP012612, DP012613, DP012614) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Dennis Keough, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen and Aurelio Torre, Deputies County Counsel, for Plaintiff and Respondent.

* * *

D.M. (father) appeals the juvenile court's order terminating his parental rights to eight-year-old K.M., seven-year-old H.M., and five-year-old D.M., Jr., at a second hearing held under Welfare and Institutions Code section 366.26. (.26 hearing; all further statutory references are to this code unless specified otherwise.) In an earlier appeal by R.M. (mother), we reversed termination of parental rights at the initial .26 hearing held in October 2007 because, though mother and father claimed Cherokee heritage at the inception of the case in the late 2005 detention hearing, Orange County Social Services Agency (SSA) failed to send requisite notice of the children's potential ancestry to any Cherokee tribes pursuant to the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq. (ICWA)). (See *In re [K.M.]* (July 11, 2008, G039485) [nonpub. opn.] (*K.M. I*).)

In the present appeal, father challenges the adequacy of the notice SSA sent to three Cherokee tribes. Because father failed to assert this challenge below, he has forfeited it on appeal. (*In re Amber F.* (2007) 150 Cal.App.4th 1152, 1156 (*Amber F.*).) In any event, the challenge also fails on the merits because SSA's inquiry on remand showed the person through whom father claimed Cherokee heritage, i.e., his biological father, L.N., specifically denied any Indian ancestry. Accordingly, *no* notice was required. Father protests the juvenile court's inquiry was inadequate because it obtained a Parental Notification of Indian Status form (see Cal. Rules of Court, rule 5.481(a)(2)) from mother, but not from father. But failure to procure the form from father was harmless where SSA's inquiry revealed the source of father's claim of Indian heritage personally denied any such ancestry. We therefore affirm the juvenile court's order terminating parental rights.

I

FACTUAL AND PROCEDURAL BACKGROUND

The facts relevant on appeal pertain only to potential Indian ancestry, and they are few. Father, who had been adopted, told SSA early in the proceedings that some family members believed his biological father's name was of Native American origin. According to father, "'[S]omething was mentioned . . . they (family members) heard it was Cherokee.'" Father added: "'I heard it could help us out (regarding involvement with SSA) and that's why I mentioned it.'" Father denied "hav[ing] any other information regarding the possibility of having Native-American heritage."

In *K.M. I*, we summarized the relevant information as follows: "At the detention hearing on November 28, [2005,] mother and father informed the court they believed both sides of the family possessed American Indian heritage, and identified the tribe as Cherokee. The court found [ICWA] may apply, and directed SSA to notify the Cherokee Nation and Bureau of Indian Affairs. SSA failed to send the required notice, however." (*K.M. I, supra*.) We also noted: "Here, mother filed a JV-120 [now ICWA-020] judicial council form indicating she may have Indian ancestry. Mother also stated the children's great-grandfather may have Indian ancestry, which she thought might be Cherokee. Mother noted the children's maternal grandmother may have additional information about the father's Indian heritage. Father also expressed his belief he was Cherokee from his biological father's side. At the detention hearing, father's counsel stated: 'There is American Indian heritage on father's side of the family. I believe it's Cherokee.'" (*Ibid.*)

We observed: "Based on these representations, the trial court ordered . . . SSA to investigate Indian heritage and to provide notice to the Cherokee Nation and the

Bureau of Indian Affairs. But SSA concedes it failed to provide the required notices, and the trial court did not make any findings regarding the applicability of ICWA. Accordingly, we reverse the judgment." (*K.M. I*, *supra*.) Specifically, our disposition provided: "The judgment is reversed. On remand, the trial court shall ensure SSA's compliance with the ICWA notice requirements and, after reviewing any response from those noticed, determine whether ICWA applies. If ICWA is applicable, the court shall proceed in compliance therewith. If the court determines ICWA does not apply, it shall reinstate the judgment in full." (*Ibid.*)

On remand, SSA reinterviewed father, who reiterated "the Cherokee ancestry was from his biological father, [L.N.] . . . ." SSA reinterviewed L.N.'s wife, the children's paternal grandmother, who confirmed her earlier denials of American Indian ancestry in her or her husband's family. On July 24, 2008, a social worker interviewed L.N., who "denied any American Indian ancestry."

SSA also reinterviewed mother, who "was adam[a]nt that she did not want the children's maternal grandmother . . . contacted to obtain family information. The mother provided contact information for the children's maternal great uncle, [J.G.], and stated he knew all the family information." After an initial impasse in interviewing J.G. "due to conflicts with work schedules," SSA reached J.G., who "claimed Cherokee ancestry and provided additional family information." Based on that information, SSA contacted the children's maternal great-great grandmother, who was unable to provide any additional information. Father raises no challenge to the ICWA notices SSA provided based on information it gathered from mother's family.

In August 2008, SSA filed with the juvenile court copies of the ICWA notice documentation it sent to three Cherokee tribes and to the Secretary of the Interior

on behalf of the Bureau of Indian Affairs (BIA). By mid-September, SSA reported all three tribes had responded with determinations the children were ineligible for enrollment based on the information provided.

At the .26 hearing held in October 2008, counsel for mother objected generally "to the recommendations of the social worker." The juvenile court "received, reviewed and filed [the] ICWA documentation." When the juvenile court inquired, "Any comments with reference to ICWA or ICWA notice?" mother's counsel responded "Just the general objection." Counsel for mother and father later clarified that "we are stating our objection to termination of parental rights and placing the children for adoption." Neither counsel called witnesses, introduced other evidence, or cross-examined the social workers. The juvenile court found SSA provided notice "to the BIA and all appropriate tribes in accordance with ICWA" and that "ICWA does not apply." The court therefore reinstated its prior order terminating parental rights, and father now appeals.

II

DISCUSSION

Father argues the ICWA notices SSA sent the three Cherokee tribes were deficient because SSA: (1) did not identify the children's paternal great-grandparents, (2) did not reveal the home address of the paternal grandparents, L.N. and J.N., (3) did not list L.N.'s place of birth, and (4) left unchecked a box that father claimed Indian heritage, though SSA's narrative description on the ICWA form made clear father claimed Cherokee ancestry through his biological father, L.N. We conclude father forfeited these claims of error by failing to raise them below.

This court has explained that when, as here, a matter is remanded to ensure ICWA compliance, a parent who fails to bring asserted defects in notice to the juvenile

court's attention forfeits the challenge on appeal. (*Amber F.*, *supra,* 150 Cal.App.4th at p. 1156.) There, "[t]he case was remanded for the sole purpose of correcting defective ICWA notice, and [the mother] had multiple opportunities to examine the notice documents." (*Ibid.*) We explained: "Had she brought the errors she now asserts to the juvenile court's attention, it could have dealt with them appropriately. She did not. At this juncture, allowing [the mother] to raise these issues on appeal for the first time opens the door to gamesmanship, a practice that is particularly reprehensible in the juvenile dependency arena." (*Ibid.*) Accordingly, we agreed (*ibid.*) with Division One of this district in *In re X.V.* (2005) 132 Cal.App.4th 794, 804 (*X.V.*), which concluded: "We do not believe Congress anticipated or intended to require successive or serial appeals challenging ICWA notices for the first time on appeal." (But see *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1197 [declining to find forfeiture where first appeal involved failure to inquire under ICWA about the child's potential Indian heritage and the second appeal turned on ICWA notice noncompliance, since forfeiture would thus afford child welfare agencies "a free pass in complying with ICWA"].)

Here, while father may have objected generally to SSA's recommendations, including termination of parental rights, he did nothing to apprise the juvenile court of the notice defects he now perceives, preventing the court from taking corrective action. As we observed in *Amber F.*, the dependent child's interests in permanency and stability require a finding of forfeiture at this stage in the proceedings, given that Congress has expressed no contrary intent. (*Amber F.*, *supra*, 150 Cal.App.4th at p. 1156.)

In any event, even assuming we were to reach the merits of father's claim, the alleged defects he identifies in SSA's ICWA notices were harmless under any standard. Simply put, the person through whom father claimed Cherokee heritage, i.e.,

his biological father, L.N., expressly denied any Native American ancestry. It follows, therefore, that the details SSA omitted — all of which related marginally to L.N. or to L.N.'s ancestry — were irrelevant for ICWA notice purposes because L.N. himself denied Indian heritage. Indeed, because father's claimed Cherokee bloodline vanished upon investigation, SSA bore no duty to provide any ICWA notice at all, at least in relation to father's claim of Indian ancestry.[1]

Father insists his claim of Cherokee heritage and L.N.'s denial amounted to a conflict in the evidence. True, "a hint" or "suggestion of Indian ancestry" is the threshold that triggers SSA's duty of notice under ICWA. (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 549; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) But here, father claimed ancestry solely through L.N., made no suggestion L.N. was unaware of his own background, and declined to present any evidence at the .26 hearing. Consequently, as the trier of fact, the juvenile court was entitled to resolve any conflict in the evidence against father. (See, e.g., *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) Indeed, in light of L.N.'s express denial, no conflict existed because father claimed any potential Indian heritage solely through L.N. and, with L.N.'s denial, no substantial evidence supported any notion of paternal Cherokee heritage. SSA therefore had no duty to notify the tribes concerning father's relatives, rendering the deficiencies father perceives meaningless.

Father also suggests the juvenile court's failure to order him to complete a Parental Notification of Indian Status form requires reversal. (See Cal. Rules of Court,

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[1] Father does not attack the sufficiency of SSA's ICWA notices in relation to mother's claim of Cherokee ancestry, except to assert incorrectly in his reply brief that SSA "never interviewed [J.G.] due to 'conflicts with work schedules.'" But the record reveals SSA eventually interviewed the children's maternal great uncle, J.G., and followed up on the information he provided. Father's imputation of error is therefore baseless.

rule 5.81(a)(2) [requiring completion of form ICWA-020 at a parent's "first appearance . . . in any dependency case"].) But unlike *In re J.N.* (2006) 138 Cal.App.4th 450, 460-461, on which father relies, the juvenile court here inquired on the record whether mother or father had Indian ancestry. "Unless the juvenile court has some further basis on which to predicate the belief a child is an Indian under the Act, the court is not required to make further inquiry." (*In re Levi U.* (2000) 78 Cal.App.4th 191, 198; see *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413 [juvenile court's obligation "is only one of inquiry"].) Here, the juvenile court fulfilled its inquiry duty and, indeed, subsequent developments negated rather than suggested Indian ancestry, dispelling the need for any additional inquiry. Consequently, the juvenile court's failure to obtain the requisite form from father was harmless.

III

DISPOSITION

The juvenile court's order terminating parental rights is affirmed.

ARONSON, J., ACTING P.J.

WE CONCUR:

FYBEL, J.

IKOLA, J.